ORIGINAL

90-6531

KEITH J. HUDSON

PETITIONER

-V-

JACK MCMILLIAN, CSO III, ET AL

RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner....., ask leave to file the attached petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in both the U.S. District Court and U.S. Court of Appeals. Petitioner's affidavit in support of his motion is attached hereto.

Supreme Court, U.S.
FILED
NOV 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

S/ Keith J. Hudson

PETITIONER--PRO SE

30 pp

KEITH HUDSON

PETITIONER

-V-

JACK MCMILLIAN CSO III, ET AL

RESPONDENT

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Keith J. Hudson being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1.) Are you presently employed? (No) last employment: 3/11/90; $2.20.

2.) Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources? (No).

3.) Do you own any cash or checking or savings account? (No).

4.) Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property? (No).

5.) List the persons who are dependent upon you for support and state your relationship to those person. (None).

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

S/ Keith J. Hudson

Subscribed and sworn to before me this 15th day of November, 1990

S/ Randolph G. Petska
NOTARY

ORIGINAL

90-6531

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

KEITH J. HUDSON
PETITIONER

-V-

JACK MCMILLIAN, CSO III, ET AL
NO.# 87-3394
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
FOR THE FIFTH CIRCUIT

RECEIVED
NOV 19 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MR. KEITH J. HUDSON #91888
CAMP J SHARK UNIT #4-L-11
LOUISIANA STATE PENITENTIARY
ANGOLA, LA.70712

PETITIONER---PRO SE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

NO.# 87-3394

KEITH J. HUDSON,
PETITIONER

-V-

JACK MCMILLIAN CSO III, ET AL,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Keith J. Hudson, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 31,1990.

OPINION BELOW

The Court of Appeals entered its Memorandum decision affirming its reversal of Petitioner Civil Action matter on July 31,1990. A copy of the memorandum is attached as Appendix A.

The Court denied Petitioner's petition for rehearing and suggestion for rehearing en banc on September 4,1990. A copy of the order is attached as Appendix B.

TABLE OF AUTHORITIES

CASES — Page

1) Black-v-Stephens, 662 F.2d 181, 188 (3rd Cir.1981)..... 4
2) Bruner-v-Dunaway, 684 F.2d 422 (6th Cir.1982)..... 5
3) Byrd-v-Brishke, 466 F.2d 6, 11 (7th Cir.1972)..... 5
4) Curtis-v-Everette, 489 F.2d 518 (3rd Cir.1973) cert.-denied, 416 U.S. 995 (1974)..... 5
5) Freeman-v-Franzen, 695 F.2d 485 (7th Cir.1982)..... 3
6) Furtado-v-Bishop, 604 F.2d 80, 95 (1st Cir.1979)..... 4
7) George-v-Evan, 633 F.2d 413 (5th Cir.1980), previous opinion at 620 F.2d 495 (5th Cir.1980)..... 3
8) Harris-v-Chanclor, 537 F.2d 203, 206 (5th Cir.1976)..... 5
9) Henderson-v-Counts, 544 F.Supp. 149 (E.D.Va.1982)..... 4
10) Huguet-v-Barnett, 900 F.2d 838 (5th Cir.1990)..... 4
11) Ingraham-v-Wright, 430 U.S. 651, 669, 97 S.Ct. 1401 (1977) (dictum), quoting 525 F.2d 909, 915 (5th Cir.1976)..... 3
12) Johnson-v-Glick, 481 F.2d 1028 (2nd Cir.), cert. denied, 414 U.S. 1033 (1973)..... 3
13) King-v-Blankenship, 636 F.2d 70 (4th Cir.1980)..... 3
14) Lamb-v-Hutto, 467 F.Supp. 562 (E.D.Va.1979)..... 3
15) Putman-v-Gerloff, 639 F.2d 415 (8th Cir.1981)..... 4
16) Ridley-v-Leavitt, 631 F.2d 358, 360 (4th Cir.1980)..... 4
17) Rochin-v-California, 342 U.S. 165, 172 S.Ct. 205 (1952). 4
18) U.S.-v-Georvassilis, 498 F.2d 883, 885 (6th Cir.1974)... 3
19) U.S.-v-Santos, 588 F.2d 1300 (9th Cir.1979)..... 3

QUESTION PRESENTED FOR REVIEW

1. Whether District Court erred in just compensating the Petitioner in one aspect of the complaint (Eight Amendment) whereas Petitioner proved at trial that defendant violated not only constitutional, but their own institutional policy. (See Tr. testimony of Capt. Cole).

2. Whether Circuit Court considered the status (Pro Se) of the Petitioner, in that it was his "first-ever" lawsuit filed, but yet, put enough effort in it, to expose the unconstitutionality of the defendants in their official capacity. And whether this inconsideration denied Petitioner his guaranteed "Due Process".

3. Whether Circuit Court decision to disturb the District Court's decision, on the grounds of a recently ruled on case, which criteria, makes it all but impossible to petition and win a case of brutality, and whether this 1990 ruling should apply retroactively to the Petitioner, because his case was in 1983.

4. Whether the Circuit Court misread the Magistrate's wording in his judgment.

JURISDICTION

On July 31,1990 the Court of Appeals entered judgment affirming its reversal of Petitioner Civil Action matter. (App. A), The jurisdiction of this Court is invoked (sic) under Title (sic) 28, United States Code, Section 1254 (1). 1/

CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, AMENDMENTS V , XIV , VIII , I

> No person shall be deprived of life, liberty or property without due process of law..... without just compensation.
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech.....
>
> Excessive bail shall not be required, nor excessive fines imposed, nor cruel & unusual punishment inflicted.
>
> .....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

1/ No other petitioner is involved in this petition

This case involves Amendments VIII, I, V, XIV, to the Constitution of the United States, made applicable to the states by Sections of all the above, and enforced by Title 42, Section 1983, United States Code:

> "Every person who, under color of any statute, ordinate, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner filed a Civil Action suit, and won the matter in United States District for the Middle District of Louisiana. Keith J. Hudson -v- Jack McMillian CSO III, et al, CA-83-1385-A M.D. La.1987. On July 31,1990, an panel of the Fifth Circuit Court of Appeals reversed the judgment. (See App.A) A timely petition for rehearing pursuant to Rules 39, 40 and 41 of the FRAP and local Rules 39 and 41 (See App.B (1) filed on August 13,1990, and the petition was denied September 4,1990 by the Fifth Circuit.

REASON FOR GRANTING THE WRIT

Courts are agreed that the excessive or unnecessary use of force violates the Constitution, but they have not agreed on what provision it violates. Some have relied on the Eighth Amendment, United States -v- Georvassilis, 498 F.2d 883, 885 (6th Cir.1974); see also Ingraham -v- Wright, 430 U.S. 651, 669, 97 S.Ct. 1401 (1977) (dictum), quoting 525 F.2d 909, 915 (5th Cir. 1976) others have held that the ordinary prison guard assault is not cruel and unusual punishment but instead is a due process violation, George -v- Evans, 633 F.2d 413 (5th Cir.1980), previous opinion at 620 F.2d 495 (5th Cir.1980); Johnson -v- Glick, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973); Lamb -v- Hutto, 467 F. Supp. 562 (E.D.Va.1979) other have avoided the question United States -v- Santos, 588 F.2d 1300 (9th Cir.1979) on cited both Eighth Amendment and the Due Process Clause Freeman -v- Franzen, 695 F.2d 485 (7th Cir.1982); King -v- Blankenship, 636 F.2d 70 (4th Cir.1980)

In Johnson -v- Glick, supra note 285; the Court stated a legal standard for prison brutality claims:

> "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. Id. 481 F.2d at 1033.

In the case at bar, Petitioner avers that he was beaten while in "full restrains". He wasn't struggling arguing with defendant McMillian up until the first punch thrown, as the reversal decision would have this Court believe in its ruling. (See App. A: pg. 2-ppgh 2)

Although Johnson was a due process case, this standard has been widely adopted under the Eighth Amendment as well as the Due Process Clause. See e.g. Putman -v- Gerloff, 639 F.2d 415 (8th Cir. 1981); King -v- Blankenship, supra; Funtado -v- Bishop, 604 F.2d 80, 95 (1st Cir.1979); Henderson -v- Counts, 544 F.Supp. 149 (E.D. Va.1982) other standards that courts have used, such as reasonable force under the circumstances Ridley -v- Leavitt, 631 F.2d 358, 360 (4th Cir.1980) or "conduct that shocks the conscience" Black -v- Stephens, 662 F.2d 181, 188 (3rd Cir.1981) amount more or less to the same thing. Johnson, supra note 285, 481 F.2d at 1033, quoting Rochin -v- California, 342 U.S. 165, 172 S.Ct. 205 (1952)

While prison officials should be afforded broad discretion in maintaining order and discipline within the prison walls, we do not think that any amount of force is justified, especially if the threat of disorder or disobedience has subsided. Ridley -v- Leavitt, supra.

In this case, the Petitioner proved the constitutional violation, and as the Circuit Court claims, the Petitioner failed or founders on the significant injury prong. Huguet -v- Barnett, 900 F.2d 838 (5th Cir.1990) But this ruling in itself falls short, because of its negligence in also considering the "mental" injury sustained, which is more significant than physical damage. Whereas the injury need not be crippling or life-threatening, Shillingford -v- Holmes, 634 F.2d 263 (5th Cir.1981) and one count has found that brandishing a loaded pistol at point-blank range was sufficient to "shock the conscience". Black -v- Stephens, supra.

The Circuit Court mustive neglecting to read the entire judgment transcript, because the Magistrate awarded the Petitioner "actual damages", and would have award the Petitioner "punitive damages", but it wasn't stipulated in the Petitioner's "relief desired", due to Petitioner's lack of knowledge of process & constructing a Civil Action complaint at that time. (See Judgment transcript)

So the "modest judgment" that the Circuit Court worded in their ruling is a misquoting and miscontrued violation of his Due Process right.

The Petitioner made more than an Eighth Amendment claim in his complaint, but the Circuit Court reversed the judgment on that alone. Whereas a "Liability" claim was asserted and never challenged, or ruled on.

If prison officials know of violations of your rights, are in a position to correct them, and fail to do so, they may be liable. Bruner -v- Dunaway, 684 F.2d 422 (6th Cir.1982); Harris -v- Chanclor, 537 F.2d 203, 206 (5th Cir.1976); Curtis -v- Everette, 489 F.2d 518 (3rd Cir.1973) cert. denied, 416 U.S. 995 (1974); Byrd -v- Bristike, 466 F.2d 6, 11 (7th Cir.1972);

The Petitioner, lastly contends that trial court erred in not considering the complaint as a whole, because it contain First & Fifth Amendment rights violations as well as Fourteenth, but put too much emphasis and attention to the Eighth, whereas testimony demostrated a clearly violation of all the stipulated constitutional rights.

CONCLUSION

For the foregoing reasons, Petitioner Keith J. Hudson respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted:

S/ Keith J. Hudson

Keith J. Hudson #91886
Camp J Shark Unit #4-L-11
Louisiana State Penitentiary
Angola, La.70712

Dated: November 15, 1990

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

U. S. DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
FILED APR 30 1987
C. LEE DUPUIS
CLERK

KEITH J. HUDSON

VERSUS

JACK McMILLIAN, CSO III,
ET AL

CIVIL ACTION

NUMBER 83-1385-A

OPINION

This matter is before the court following a trial on the merits on March 10, 1987.

Plaintiff, an inmate at Louisiana State Penitentiary, Angola, Louisiana, brought this action pursuant to 42 U.S.C. §1983 against corrections officers Jack McMillian, Marvin Woods and Arthur Mezo.

The plaintiff had consented to disposition of this case by a magistrate pursuant to 28 U.S.C. §636(c) on November 26, 1986 and the defendants consented on December 9, 1986. An order of reference was entered on December 11, 1986. When the case was called for trial, the plaintiff moved for a continuance, which was denied. The parties were then requested to confirm on the record that they had consented to trial before the magistrate. Archie v. Christian, 808 F.2d 1132 (5th Cir. 1987). The defendants affirmed their consent, but the plaintiff stated he wished to revoke his consent. Plaintiff stated no reason for wishing to do so.

NOTICE MAILED TO:
DATE 4-30 BY RD
Hudson
Penn
SCR
MS

FEE
PROCESS
X CHARGE RD
INDEX
ORDER
HEARING
DOCUMENT NO. 37

While consent must be voluntarily given, there is no corresponding right to revoke it if later developments in the case, now before the magistrate, indicate to a party that tactically he would be better off before a district judge. Although one district judge or magistrate may be more or less lenient with a pro se litigant in terms of how a case is tried or may evaluate a pro se plaintiff and his witnesses more or less favorably than another judge or magistrate, these considerations are not sufficient to permit a party who has voluntarily consented to a bench trial before the magistrate to withdraw that consent immediately before the trial begins. See, Southern Agriculture Co. v. Dittmer, 568 F.Supp. 645 (D. Ark. 1983).

Nor does the fact that in this particular case the magistrate could have converted the trial to an evidentiary hearing under section 636(b)(1)(B) and the district court's original reference of this case to the magistrate on June 4, 1984 justify allowing the plaintiff to revoke his consent. For his own reasons, the plaintiff consented. He did not indicate that his consent was coerced or given under any threats. See, Adams v. Heckler, 794 F.2d 303 (7th Cir. 1986). His attempt to revoke it following immediately on the heels of a denied motion for a continuance was an obvious attempt to delay the trial at the last moment. Therefore, the plaintiff's revocation of his consent will not be accepted.

This case involves an alleged beating of the plaintiff by defendants McMillian and Woods. Plaintiff also claims that Mezo, a lieutenant, stood by while the other two defendants beat the plaintiff. Plaintiff further claims that the defendants denied his repeated requests for medical attention.

Edward Allen testified that on October 30, 1983 in the early morning hours he was housed on the same tier as the plaintiff at Camp J in an adjacent cell. An argument occurred between him and the plaintiff, but no real disturbance took place. Plaintiff had been washing his clothes in his cell. Woods came down the tier and "had words" with the plaintiff. McMillian also approached the plaintiff's cell and told the plaintiff to shut up. Allen said Woods had what he characterized as a nasty attitude toward inmates.

While Allen said he could hear what was going on, he could not see it clearly because of the way the cells are constructed. He saw the plaintiff being removed from his cell. Then, he testified, he heard the plaintiff hollering and what sounded like "licks" - blows - being "passed." Later Allen was removed from his cell and also beaten by Woods and McMillian.

Later, the plaintiff told Allen he had been beaten and his mouth had been injured. Plaintiff showed Allen his face, mouth and broken front brace. Allen specifically recalled a bruise on the plaintiff's lip. Allen testified that when the plaintiff

left his cell he was handcuffed and shackled, offered no resistance and was not visibly bruised or swollen.

On cross examination, Allen confirmed that he recognized the voices of McMillian and the plaintiff as he, Allen, had been on that tier for a few months and the plaintiff was there when he arrived. Also, Woods and McMillian had been working there also before his arrival.

Allen testified that McMillian kept speaking to the plaintiff in a provocative manner.

Allen said he was aware that the plaintiff had written to Major Dave Kelone to complain about the incident and asked for an investigation (Exhibit D-1), but did not recall actually seeing the letter nor whether Kelone spoke to him, Allen, during the investigation.

Inmate Earl Truvia also testified that on October 30, 1983 he was housed at Camp J, Cuda 3-4 Unit. He heard a commotion early that morning at about 1:45 a.m. which sounded like punches and scuffling and he heard screams.

On November 1, 1983 he saw the plaintiff in the yard. Plaintiff had bruises on his lip and over one eye, and a swollen cheek. He saw no blood or cuts. Plaintiff told Truvia he was involved in an incident with the security guards.

Truvia admitted that he did not see any scuffle and that the time could have been as late as 3:00 or 4:00 a.m., but he thought it was between 1:45 and 2:30 a.m. Truvia could not tell from the

sounds he heard whether it was the plaintiff involved in the scuffle, and he heard only one incident.

Hudson testified that he had an argument - "passed words," as he calls it - and McMillian said he would be back with something for the plaintiff. McMillian came back shortly and the two had more words. McMillian told the plaintiff to pack his belongings because he was going to the dungeon (administrative lockdown). Woods arrived to assist McMillian. After leaving his cell in restraints, Woods and McMillian walked with the plaintiff to administrative lockdown. On the way, plaintiff testified, McMillian commented to Woods about knocking the plaintiff's teeth out and then McMillian punched the plaintiff in the eye, chest and mouth, while Woods held the plaintiff by the back of the plaintiff's jumpsuit and kicked and punched the plaintiff in the back. Plaintiff testified that Mezo came out and told them "not to have too much fun."

Plaintiff testified that he asked Captain James Cole also to put him on the sick call list. Plaintiff emphatically testified that he did tell the sick call man he had been beaten. Plaintiff stated he had no problems with his partial plate prior to this incident. The plate was not usable until it was repaired in February 1984, plaintiff testified. In the meantime, he could eat satisfactorily, although it felt strange.

Plaintiff testified that when he went to his disciplinary

board hearing he asked to be sent to the hospital, but the board refused to discuss his request.

Defendants called Officer James Cole. He testified that normally the shift supervisor or an escort officer escorts an inmate to lockdown. An officer who abuses an inmate is subject to disciplinary action, and probably discharge, in an incident such as the one described by the plaintiff. He added that if an incident of the use of force is reported it is investigated to either confirm or refute the allegations. This procedure is for the protection of the officer if the charges are unfounded. Cole did not recall seeing the plaintiff on October 31, 1983 nor did he recall any incident of brutality at Camp J.

Gary Dubroc testified that he was a sick call man at Camp J in 1983. He said he saw the plaintiff on October 31 or November 1, 1983 but the plaintiff did not ask to be sent to the hospital. He added that if the plaintiff had told him that security officers had beaten the plaintiff, he would have sent him to the hospital. Dubroc admitted on rebuttal that the sick call sheet dated November 1, 1983 (Exhibit D-5) was not signed by him.

Marvin Woods denied that he used any force whatsoever against the plaintiff. The plaintiff was taken to lockdown by Lt. Mezo and himself, while McMillian remained behind. Woods testified that the plaintiff and Allen were arguing about the noise the plaintiff was making hand washing some clothes in his cell. Woods handcuffed the plaintiff and Mezo went with Woods

and the plaintiff to lockdown where Mezo removed the handcuffs. Woods testified this would be in accordance with prison procedure requiring the shift supervisor to escort an inmate to lockdown since Mezo was the shift supervisor at the time.

Woods could recall no instance of brutality at Camp J. In his opinion, an inmate, even in full restraint, is always a threat. Woods testified he was not familiar with the provisions of the Eighth Amendment to the United States Constitution. However, he stated he would not inflict harm on an inmate except in the line of duty, but in doing his duty would do whatever was necessary, without limitation, to maintain security.

David Lemoine, a medical specialist, testified that he saw the plaintiff on November 1, 1983 at sick call. Plaintiff had some dental complaint at that time. Had the plaintiff complained of a beating causing loose teeth it would have been noted on the sick call sheet. However, the plaintiff appeared to be in no acute distress (NAD) as is noted on the sick call sheet. Exhibit D-5. Lemoine explained under cross examination that NAD means the observed condition is not life threatening and no immediate attention is required. Lemoine noted on the sick call sheet that the plaintiff had been scheduled for dental call out since July 1983. Lemoine did not notice any swelling or bruises, and if he had, he would have noted it on his sick call sheet, he testified.

While there is conflicting testimony about almost all aspects of this case, the testimony about the use of force is the

most divergent. According to the plaintiff, Woods and McMillian, with Mezo's express approval, beat the plaintiff totally without justification or need. This is supported by the testimony of Allen. The plaintiff's injuries were corroborated by Truvia. Needless to say, all of these are convicted felons.

The defendant who testified, Woods, denied that any force whatsoever was used against the plaintiff. The medical records do not show that the plaintiff was sent to the hospital on October 30, 1983. The first medical record entry is November 1, 1983 which notes a problem with the plaintiff's teeth of an unspecified nature. Other defense witnesses denied the plaintiff sought medical attention from them. The plaintiff testified that he repeatedly sought medical attention but was refused. He argued that by refusing his requests, the plaintiff would not be able to produce contemporaneous medical records to document his injuries. Defendants introduced reports by Mezo and McMillian for the limited purpose of showing that they reported an incident, but the court refused to admit the reports for the truth of their contents since neither defendant testified, and counsel for these defendants did not urge any hearsay exception in support of their admissibility.

Plaintiff did write a letter of complaint to the camp major, Dave Kelone (Exhibit D-1) the same day of the incident, which was received on November 2, 1983, complaining of the beating meted out by Woods and McMillian.

FINDINGS OF FACT

Based on the credibility of the witnesses, the contemporaneous complaint to Kelone (Exhibit D-1), the sick call sheet (Exhibit D-5) and the testimony of the plaintiff, Allen and Truvia, the court finds that defendants Woods and McMillian used force on the plaintiff when there was no need to use any force at all, and that Mezo expressly condoned the use of force in this instance.

The court further finds that the force used resulted in minor bruises and swelling to the plaintiff's face, mouth and lip, and also damaged his partial plate sufficiently to make it unwearable for three to four months. During this time the plaintiff suffered no harm or medically adverse consequences due to the broken plate.

Plaintiff's injuries from the beating were minor and required no medical attention. They healed naturally without medical intervention. Plaintiff was seen by a medical specialist two day after the incident who observed no serious injuries and who felt no treatment was necessary.

APPLICABLE LAW

The focus of a section 1983 claim is on the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Monroe v. Pape, 365 U.S. 167, 184, 81 S.Ct. 473, 482 (1961) quoting U. S. v. Classic, 313 U.S. 299, 325-26, 61 S.Ct.

1031, 1043 (1941). To determine whether physical abuse by a prison guard constitutes an abuse of power, the court must consider three factors: the amount of force exerted relative to the need for its application, the extent of injury inflicted; and the motivation of the officers. Johnston v. Lucas, 786 F.2d 1254 (5th Cir. 1986); Williams v. Kelley, 624 F.2d 695, 697 (5th Cir. 1980), cert. denied, 451 U.S. 1019 (1981). While these factors must be considered, it is not necessary that the injury received be severe to constitute a constitutional violation. U. S. v. Bigham, ____ F.2d ____ (5th Cir. 1987) (No. 86-2174, March 9, 1987). See, Wade v. Reed, 709 F.2d 345 (5th Cir. 1983) (suggesting that any injury suffices where no force is justified). Compare, Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981) (Fourteenth Amendment claim against city police officer).[1]

Here there was no need to use any force since the plaintiff was already in restraints. Since the plaintiff was harmed, the only explanation for it is the unnecessary use of force by Woods and McMillian. Mezo did not actually strike the plaintiff, but the credible testimony is that he was present, and in a position to stop Woods and McMillian, but instead acted only to temper their actions. This was an explicit approval of at least a

[1] This is not an isolated assault which arguably would remove the incident from the realm of "punishment" as that term is used in the Eighth Amendment. George v. Evans, 620 F.2d 495 (5th Cir. 1980). According to inmate Allen, after defendants Woods and McMillian finished with the plaintiff, they came back, shackled and cuffed Allen and then beat him also on the way to administrative lockdown.

limited beating. The defendants' conduct can only be seen as motivated by malice. All the defendants, by their acts of commission and omission, violated the plaintiff's rights under the Eighth Amendment by the use of unnecessary and excessive force.

Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 291 (1976), set the standard for proving Eighth Amendment deprivations of medical care: the plaintiff must prove "deliberate indifference to serious medical needs." The essential test is one of medical necessity and not one simply of desirability. Woodall v. Foti, 648 F.2d 268, 272 (5th Cir. 1981). The plaintiff proved he was injured, but his injuries were minor and healed without complication. Additionally, the plaintiff was aware of the sick call procedure and used it two days later. There was no proof that Mezo, Woods or McMillian denied the plaintiff access to sick call, even if they did not bring him to the hospital. His injuries were not obviously serious enough to warrant a hospital visit. No defendant deprived the plaintiff of his Eighth Amendment rights insofar as adequate medical care is concerned.

DAMAGES

Plaintiff proved only minor injuries to his back and mouth, and "a strange feeling" when eating for several months. He expressed no fear that any defendant would repeat the incident, nor did he testify about lost sleep, anxiety or depression caused by the incident. The beating was of short duration. The sum of

$800.00 is sufficient to compensate the plaintiff for his injuries.

Plaintiff did not pray for punitive damages in his complaint nor any subsequent pleading. Therefore, the court expresses no opinion on whether this is a proper case for the imposition of punitive damages.

Plaintiff's prayer for injunctive relief is unsupported by any evidence of irreparable harm nor any evidence that this incident was or will be repeated. Injunctive relief is not warranted.

CONCLUSION

Accordingly, judgment will be entered in favor of the plaintiff and against the defendants, in solido, for the sum of $800.00, plus interest from the date of judgment until paid and court costs.

Baton Rouge, Louisiana, April 30, 1987.

Stephen C. Riedlinger
UNITED STATES MAGISTRATE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

APPENDIX - A

No. 87-3394
(Summary Calendar)

KEITH J. HUDSON,

Plaintiff-Appellee,

versus

JACK McMILLIAN, CSO III, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Louisiana
(CA-83-1385-A)

(July 31, 1990)

Before POLITZ, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:*

On appeal is a judgment rendered by a magistrate in favor of a prisoner who was physically mistreated by corrections officers. In light of the standards established by this court's intervening decision in **Huguet v. Barnett, 900 F.2d 838 (5th Cir. 1990), and progeny, however, we must reverse.**

Keith J. Hudson, a Louisiana state prisoner confined to Angola penitentiary invoked 42 U.S.C. § 1983 and sued corrections officers Jack McMillian, Marvin Woods, and Arthur Mezo. The parties consented to disposition of the case by a magistrate, 28 U.S.C. § 636(c). The evidence reflects that on October 30, 1983 Hudson got into an argument with McMillian who punched Hudson in the mouth, eyes, chest, and stomach while Woods held him. The blows cracked Hudson's partial dental plate, split his lower lip and loosened his teeth. He received bruises to his body but no other cuts. Woods kicked Hudson on his backside. Mezo, the supervisor of McMillian and Woods, watched the beating but merely cautioned the officers not to "have too much fun."

Hudson appeared at sick call on October 31 and November 1, 1983 with a dental complaint; his medical record contains no reference to facial bruises or other injuries.

In awarding Hudson a modest judgment the magistrate credited the testimony of Hudson, rejecting that of the officers, and concluded that "defendants Woods and McMillian used force on the plaintiff when there was no need. . . . the force used resulted in minor bruises and swelling to the plaintiff's face, mouth and lip. . . . [p]laintiff's injuries

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

from the beating were minor and required no medical attention." Defendants timely appealed.

This court joins the magistrate in deploring the use of unnecessary force in the treatment of prisoners. Hopefully someday this blight on our criminal justice system will be forever removed. However not every use of excessive force rises to a constitutional violation cognizable under 42 U.S.C. § 1983.

In our recent decision in Huguet v. Barnett we announced the standard to be applied in excessive force claims made by prisoners under the eighth amendment. We there held that to prevail in such a claim four elements must be proven:

> 1. a significant injury, which
> 2. resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was
> 3. objectively unreasonable, and
> 4. the action constituted an unnecessary and wanton infliction of pain.
>
> If any one of these elements fails, so too does the plaintiff's claim.

900 F.2d at 841.

In the case at bar no force was required; therefore, the force used was objectively unreasonable. The conduct of McMillian and Woods qualified as clearly excessive and occasioned unnecessary and wanton infliction of pain.

Hudson's claim, however, founders on the significant injury prong.

Huguet evolved from our en banc decision in Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989), a fourth amendment excessive-force case. We there held that minor harms do not rise to constitutional proportions. In awarding recovery the magistrate characterized Hudson's injuries as "minor" and noted that they "required no medical attention." The injuries sustained by Hudson are not unlike those at issue in our recent decision in Wise v. Carlson, 902 F.2d 417 (5th Cir. 1990), which were held not to constitute a significant injury. In Wise the inmate sustained bruises to the anterior chest wall and right forearm and a hematoma to his right upper eyelid. The Wise case injuries were insufficient to base a section 1983 claim; Hudson's injuries are likewise insufficient.

For these reasons the judgment is REVERSED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-3394

KEITH J. HUDSON,

Plaintiff-Appellee,

versus

JACK McMILLIAN, CSO III, ET AL.,

Defendants-Appellants.

APPENDIX-B

Appeal from the United States District Court for the Middle District of Louisiana

---

ON PETITION FOR REHEARING

(September 4, 1990)

Before POLITZ, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

Henry A. Politz
United States Circuit Judge

REHG-4